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REDACTED – FOR PUBLIC INSPECTION

Via ECFS

April 8, 2016

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247; *Special Access for Price Cap Local Exchange Carriers*; *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593

Dear Ms. Dortch:

CenturyLink submits the attached written ex parte to expand upon and reinforce its previous filings and meetings with Commission staff describing the extensive competition – particularly from cable operators – that characterizes the high-capacity marketplace, and to highlight the importance of this evidence to the Commission’s resolution of these proceedings.

The notice discusses cable-generated competition for retail and wholesale business data services; cable-provided Ethernet-over-fiber and Ethernet-over-HFC services; cable broadband Internet access services as a viable alternative to ILEC business data services; how ILECs are responding to cable competition; current and potential competition from cable operators that was not captured in the 2013 data collection and why this is critical to an accurate assessment of the market; why additional regulations on ILEC enterprise broadband services are not reasonable; and why the FCC must consider the impact of cable-provided business data services in its regulation of ILEC DS1 and DS3 services.

The notice contains highly confidential information that is the proprietary commercial information of CenturyLink and is entitled to protection from public disclosure by the relevant protective orders in the above-referenced dockets, as described in the Confidentiality Appendix attached to this letter. Although the highly confidential information is specifically protected

from disclosure pursuant to the terms of the *Tariff Investigation Protective Order* (Appendix B to the Order and Protective Orders in WC Docket No. 15-247),¹ as well as the *Special Access Rulemaking Second Protective Order* in WC Docket No. 05-25, et al.,² the Confidentiality Appendix attached to this correspondence provides separate justification for highly confidential treatment under FOIA³ and the Commission's implementing rules, 47 C.F.R. §§ 0.457, 0.459.

Given the highly confidential nature of the information enclosed with this submission, the non-redacted version is marked, consistent with the Dec. 4th *Protective Order* and the *Special Access Rulemaking Second Protective Order*, as "**HIGHLY CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDERS IN WC DOCKET NOS. 15-247 AND 05-25, RM-10593 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION**". This Highly Confidential Information is competitively sensitive commercial information and thus should not be available for public inspection. Release of the Highly Confidential Information would have a substantial negative competitive impact on CenturyLink. Accordingly, the submitted Highly Confidential Information is appropriate for non-disclosure pursuant to the Dec. 4th *Protective Order* and the *Special Access Rulemaking Second Protective Order*, and under FOIA and sections 0.457(d) and 0.459 of the Commission's rules (as detailed in the attached Confidentiality Appendix).

Consistent with the Dec. 4th *Protective Order* and the *Special Access Rulemaking Second Protective Order*, CenturyLink is filing two hard copies of its non-redacted submission with the Office of the Secretary (one for WC Docket No. 15-247 and one for WC Docket No. 05-25, RM-10593) and providing two hard copies of its non-redacted submission to the staff of the Wireline Competition Bureau (Marvin Sacks).

CenturyLink is also filing today via the Commission's Electronic Comment Filing System (ECFS) a redacted version of its submission. Consistent with the Dec. 4th *Protective Order* and the *Special Access Rulemaking Second Protective Order*, the redacted version of CenturyLink's

¹ *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 15-247 and 05-25, RM-10593, Order and Protective Orders, 30 FCC Rcd 13680 (rel. Dec. 4, 2015) (Dec. 4th *Protective Order*).

² *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, *Second Protective Order*, 25 FCC Rcd 17725 (rel. Dec. 27, 2010) (*Special Access Rulemaking Second Protective Order*).

³ 5 U.S.C. § 552.

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filing, in which the Highly Confidential Information is omitted, is marked, "**REDACTED – FOR PUBLIC INSPECTION**".

The text of this letter and the attached Confidentiality Appendix, which contain no Highly Confidential Information, are the same for both the non-redacted and redacted versions except for the confidentiality markings and the manner of submission noted in the heading on the initial page.

Please contact the undersigned with any questions.

Sincerely,

/s/ Melissa E. Newman

Enclosure

Copy to:
Pamela Arluk
Thom Parisi
Christopher Koves
Eric Ralph
William Layton
Deena Shetler
Joseph Price
William Kehoe

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CONFIDENTIALITY APPENDIX

47 C.F.R. § 0.457

Information included with CenturyLink's April 7, 2016 Ex Parte Notice is entitled to highly confidential treatment under 47 C.F.R. § 0.457, and the Dec. 4th *Protective Order* in WC Docket Nos. 15-247 and 05-25, RM-10593, as well as the *Special Access Rulemaking Second Protective Order* in WC Docket No. 05-25, RM-10593.

The types of Highly Confidential Information being submitted include: the percentage decline in the number of DS1s provided by CenturyLink between 2012 and 2015; the portions of retail Ethernet customers captured by cable operators in CenturyLink's ILEC footprint; the amount of CenturyLink's operating revenues generated outside CenturyLink's ILEC footprint; the amount of access services CenturyLink purchased in 2015; trends in CenturyLink's access purchases from ILEC and non-ILEC vendors; the number of high-value buildings to which CenturyLink can obtain Ethernet access from competitive LECs, cable providers and other vendors; descriptions of the business arrangements that CenturyLink has with cable vendors; descriptions of CenturyLink Ethernet purchases from cable operators via fiber or HFC; the percentage of CenturyLink customers that choose to buy CenturyLink Ethernet Class of Service and the distribution percentage offered by CenturyLink's cable vendors; data on the Service Level Agreements that CenturyLink has negotiated with its Ethernet access vendors; descriptions of actions by CenturyLink as an out-of-region CLEC in purchasing cable broadband Internet access and other non-ILEC Ethernet access services and the percentage of buildings reached; information related to promotional pricing offered by ILECs in response to cable competition; information on discounts offered by CenturyLink, including to wholesale customers on its Ethernet services in response to competition from cable operators; information on the general availability of non-ILEC Ethernet services as it relates to ILEC pricing for DS1 and DS3 services; identification of customers purchasing particular CenturyLink offerings; CenturyLink's average revenue per unit for a specified service; the percentage of CenturyLink's Metro Ethernet revenues that are for wholesale services.

All of this information is highly sensitive commercial information regarding CenturyLink's business operations and product/service offerings (which is the type of information described in Attachment 1 to Appendix B of the *Tariff Investigation Protective Order* and ¶ 6 of the *Special Access Rulemaking Second Protective Order*). And, CenturyLink's customers, suppliers and competitors may also consider some of the information to be proprietary and competitively sensitive. All of this highly confidential proprietary commercial information also is not routinely available from CenturyLink nor is it available for public inspection from the Commission and thus is protected from public availability under 47 C.F.R. § 0.457(d).

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47 C.F.R. § 0.459

CenturyLink also considers the Highly Confidential Information submitted with its Ex Parte Notice as protected from public disclosure pursuant to 47 C.F.R. § 0.459(b) as described as follows.

Information for which confidential treatment is sought

CenturyLink seeks highly confidential treatment for information included with its April 8, 2016 Ex Parte Notice in WC Docket Nos. 15-247 and 05-25, RM-10593, which is highly sensitive commercial information regarding CenturyLink's business operations and product/service offerings that is protected from public disclosure and availability.

Commission proceeding in which the information was submitted

The Ex Parte Notice is being filed in WC Docket No. 15-247, *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans* and in WC Docket No. 05-25, RM-10593, *Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*.

Degree to which the information in question is commercial or financial, or contains a trade secret or is privileged

The Highly Confidential Information included with CenturyLink's Ex Parte Notice that it considers commercially sensitive and proprietary includes the percentage decline in the number of DSIs provided by CenturyLink between 2012 and 2015; the portions of retail Ethernet customers captured by cable operators in CenturyLink's ILEC footprint; the amount of CenturyLink's operating revenues generated outside CenturyLink's ILEC footprint; the amount of access services CenturyLink purchased in 2015; trends in CenturyLink's access purchases from ILEC and non-ILEC vendors; the number of high-value buildings to which CenturyLink can obtain Ethernet access from competitive LECs, cable providers and other vendors; descriptions of the business arrangements that CenturyLink has with cable vendors; descriptions of CenturyLink Ethernet purchases from cable operators via fiber or HFC; the percentage of CenturyLink customers that choose to buy CenturyLink Ethernet Class of Service and the distribution percentage offered by CenturyLink's cable vendors; data on the Service Level Agreements that CenturyLink has negotiated with its Ethernet access vendors; descriptions of actions by CenturyLink as an out-of-region CLEC in purchasing cable broadband Internet access and other non-ILEC Ethernet access services and the percentage of buildings reached; information related to promotional pricing offered by ILECs in response to cable competition; information on discounts offered by CenturyLink, including to wholesale customers on its Ethernet services in response to competition from cable operators; information on the general

availability of non-ILEC Ethernet services as it relates to ILEC pricing for DS1 and DS3 services; identification of customers purchasing particular CenturyLink offerings; CenturyLink's average revenue per unit for a specified service; the percentage of CenturyLink's Metro Ethernet revenues that are for wholesale services.

All of this information is highly sensitive commercial information regarding CenturyLink's business operations and product/service offerings (which is the type of information described in Attachment 1 to Appendix B of the *Tariff Investigation Protective Order* and ¶ 6 of the *Special Access Rulemaking Second Protective Order*). And, CenturyLink's customers, suppliers and competitors may also consider some of the information to be proprietary and competitively sensitive. All of this highly confidential proprietary commercial information also is not routinely available from CenturyLink nor is it available for public inspection from the Commission and thus is protected from public availability under 47 C.F.R. § 0.457(d).

Degree to which the information concerns a service that is subject to competition; and manner in which disclosure of the information could result in substantial competitive harm

The types of Highly Confidential Information included with CenturyLink's Ex Parte Notice would generally not be subject to routine public inspection under the Commission's rules (47 C.F.R. § 0.457(d)), demonstrating that the Commission already anticipates that its release likely would produce competitive harm. The telecommunications services CenturyLink provides -- including the services that are at issue in the tariff investigation and the special access rulemaking proceedings -- are all competitive. The release of this highly confidential proprietary information would cause competitive harm by allowing competitors to become aware of sensitive commercial information regarding CenturyLink's business and internal operations, and the competitive markets in which CenturyLink operates. And, the release of information CenturyLink's customers consider to be proprietary and competitively sensitive could also cause the company competitive harm.

Measures taken to prevent unauthorized disclosure; and availability of the information to the public and extent of any previous disclosure of the information to third parties

CenturyLink has treated and treats the sensitive commercial information disclosed in its Ex Parte Notice as highly confidential, and has protected it from public disclosure.

Justification of the period during which CenturyLink asserts that the material should not be available for public disclosure

At this time, CenturyLink cannot determine any date on which the sensitive commercial information included with its submission should not be considered highly confidential.

Other information that CenturyLink believes may be useful in assessing whether its request for confidentiality should be granted

Under applicable FCC and court rulings, the information in question should be withheld from public disclosure. Exemption 4 of the Freedom of Information Act shields information that is (1) commercial or financial in nature; (2) obtained from a person outside government; and (3) privileged or confidential. The information in question satisfies this test.

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Via ECFS

April 8, 2016

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans, WC Docket No. 15-247; Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, WC Docket No. 05-25, RM-10593

Dear Ms. Dortch:

CenturyLink submits this letter to expand upon and reinforce its previous filings and meetings with Commission staff describing the extensive competition – particularly from cable operators – that characterizes the high-capacity marketplace, and to highlight the importance of this evidence to the Commission’s resolution of these proceedings. This letter also notes that this competition is not fully reflected in the 2013 data collection, given the limited information required from cable operators, and that the Commission cannot reasonably or lawfully ignore information on current competition simply because it deems that information too recent or because it is absent in the data collection. If this information is given the weight it deserves, the Commission also could not reasonably impose additional regulation on ILEC enterprise broadband or DS_n services.

As CenturyLink has previously explained, the data collection in the *Business Data Services* proceeding revealed the presence of pervasive competition in the business data services marketplace in 2013.¹ Competition has only accelerated since that time, particularly with cable

¹ See, e.g., Comments of CenturyLink, WC Docket No. 05-25, RM-10593, at 5-11 (Jan. 28, 2016); Reply Comments of CenturyLink, WC Docket No. 05-25, RM-10593 (Feb. 19, 2016); Letter from Melissa Newman, CenturyLink, to Marlene H. Dortch, FCC, WC Docket Nos. 15-247, 05-25, RM-10593 (Mar. 17, 2016).

operators dramatically expanding their offerings of retail and wholesale Ethernet services in competition with the DSn and Ethernet services that are the subject of these proceedings. Whether provided over fiber or hybrid fiber coax (HFC) facilities, these cable offerings include Service Level Agreements (SLAs) comparable to those for ILEC Ethernet services and are otherwise indistinguishable from those ILEC services. In some cases cable service agreements have included such SLAs for several years. As evidenced by CenturyLink's out-of-region purchases and the actions of CLECs in CenturyLink's ILEC territories, it is clear and indisputable that these cable services are substitutes for ILEC business data services. While broad availability of these cable offerings is relatively recent, its constraining effect on the rates, terms and condition for ILEC business data services is by no means speculative or prospective. Cable operators are also using their broadband Internet access services to win former DSn customers who are looking for high broadband speeds at the lowest price and do not require dedicated capacity. Critically, none of this additional yet important information is reflected in the 2013 data collection.

Given the ubiquity of cable facilities that already support business data services or are capable of doing so, these trends will only continue to grow. It would thus be reversible error for the Commission to ignore or discount these marketplace developments in evaluating the issues raised in the *Business Data Services* and *Tariff Investigation* proceedings, both in considering appropriate regulation of ILEC DSn services and addressing the laundry list of additional regulations sought by certain CLECs. And once this evidence is properly taken into account, it should be clear that there is no need for the Commission to impose further regulation on ILEC DSn services, as doing so would only delay the natural migration to Ethernet and other IP-based services. Instead, the Commission should retain Phase II relief in all MSAs that currently have that relief; extend this relief to all MSAs that currently have Phase I relief or no relief, where the data show a presence of substantial competitive facilities; revise the triggers to better reflect the presence of competition; and make reciprocal any revision to a more granular regime so that ILECs can obtain relief in smaller geographic areas subject to competition.

Discussion

1. Cable-generated competition for retail and wholesale business data services is real and happening now.

In a series of filings in the above-referenced dockets, CenturyLink and other parties, including the largest cable trade association, have catalogued cable operators' dramatic growth and success in providing retail and wholesale business data services over the past few years. As NCTA has noted, "DS1 services are rapidly declining and being replaced by IP-based services

offered by both cable operators and CLECs.”² Cable providers are particularly well-situated to capitalize on this technology transition, as “[v]irtually any area with special access demand will contain cable company facilities that serve, or are capable of serving, business customers.”³ Cable providers have used these facilities to “expand[] the number of commercial buildings they serve, the geographic footprint of their networks, and the types of services they offer to business customers (including increasing use of service level agreements)[,]” such that cable operators now “play a significant and growing role in the market for business data services[],”⁴ despite CLECs’ steadfast refusal to acknowledge this reality in this docket.⁵

This competition from cable operators is by no means prospective, or merely potential, as some CLECs seem to suggest.⁶ It also has not “suddenly ‘sprung up’—in the short period between the data collection and today.”⁷ Cable operators have been investing heavily in business markets for years, and steadily increasing their revenues for enterprise services,⁸ leveraging their

² See Reply Comments of the National Cable & Telecommunications Association, WC Docket No. 05-25, RM-10593, at 10 (Feb. 19, 2016) (NCTA Reply Comments).

³ NCTA Reply Comments at 14.

⁴ Letter from Steven F. Morris, NCTA, to Marlene H. Dortch, FCC, WC Docket No. 05-25, at 1 (Mar. 22, 2016) (NCTA March 22nd Ex Parte).

⁵ See, e.g., Reply Comments of Sprint, WC Docket No. 05-25, RM-10593, at 55-56 (Feb. 19, 2016) (Sprint Reply Comments) (claiming that cable Ethernet-over-HFC services are “fundamentally different” from ILEC special access services and that cable operators lack sufficiently broad networks to compete successfully with ILECs); Reply Comments of Birch, *et al.*, WC Docket No. 05-25, RM-10593, at 10 (Feb. 19, 2016) (asserting that “cable companies do not and cannot possibly compete on the scale needed to discipline the incumbent LECs in the provision of dedicated services”). Notably, the CLECs have not directly addressed the voluminous and detailed evidence CenturyLink has submitted in these proceedings showing that cable operators now offer Ethernet service to millions of commercial buildings, in competition with ILECs. Nor could they credibly demonstrate on the record that they do not purchase wholesale services from cable operators and use them as substitutes for ILEC business data services.

⁶ See, e.g., Sprint Reply Comments at ii (suggesting that ILECs are “scrambl[ing] to show that competition is on the cusp of materializing”).

⁷ See *id.* at 53.

⁸ See The Insight Research Corp., *Cable TV Enterprise Services: 2012-2017*, at 26 (Sept. 2012) (by 2011, Comcast, Time Warner Cable and Cox had each passed \$1 billion in annual

tremendous growth and success in residential broadband and telephony services, at the expense of their ILEC competitors.⁹

CenturyLink has experienced cable operators' entry and dramatic growth in the business data service marketplace first-hand—as both a retail competitor *and* a wholesale customer. In its ILEC footprint, CenturyLink's DS1 and DS3 sales have steadily declined, as customers move to Ethernet and other IP-based broadband services, including cable broadband services. From the beginning of 2012 to the end of 2015, the number of DS1s provided by CenturyLink declined by [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] percent, with a large percentage of these customers switching to cable and other non-ILEC providers. In CenturyLink's ILEC footprint, for example, cable operators have already captured [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] of retail Ethernet customers.¹⁰

Outside of its ILEC footprint, CenturyLink is a major CLEC and purchaser of access services. Indeed, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY

"commercial services" revenue); Thomson Reuters StreetEvents, *CMCSA – Q3 2015 Comcast Corp. Earnings Call*, Edited Transcript, at 5 (Oct. 27, 2015) ("*Comcast Q3 Earnings*") (Comcast's business services have been the "second-largest contributor to overall cable revenue growth for 18 of the last 19 quarters") (quoting Mike Cavanagh, Senior EVP & CFO of Comcast Corp.); Charter Response to FCC's Information and Data Request, MB Docket No. 15-149, at 18 (October 16, 2015) (as a result of its fiber investments, "business services has been one of the fastest growing areas within Charter," with year-over-year revenue growth averaging just under 20 percent).

⁹ See Zacks Equity Research, *Cable MSOs Gain Traction in Large Business Space*, available at: <http://www.zacks.com/stock/news/191150/cable-msos-gain-traction-in-large-business-space> (Sept. 23, 2015); Multichannel News, *Mike Farrell, Comcast Business Bows New Unit Targeting Fortune 1000; Offers Managed Services to Large Businesses with Multiple Locations*, available at: <http://www.multichannel.com/news/cable-operators/comcast-business-unwraps-new-unit-targeting-fortune-1000/393805> (Sept. 16, 2015).

¹⁰ See CenturyLink Reply Comments, WC Docket No. 05-25, RM-10593, Exhibit 4 (TNS Business Wave 1Q2014 to 4Q2015 Metro Ethernet provider market share by customer count within CenturyLink's ILEC footprint) (TNS Business Wave Survey) (Feb. 19, 2016). AT&T and Verizon have seen similar competitive losses to cable-provided Ethernet and broadband services. See Letter from Christopher T. Shenk, attorney for AT&T, to Marlene H. Dortch, FCC, WC Docket No. 05-25, RM-10593, at 7-8 (Mar. 21, 2016) (AT&T March 21st Ex Parte); Letter from Maggie McCreedy, Verizon, to Marlene H. Dortch, FCC, WC Docket Nos. 15-247, 05-25, RM-10593, at 4 (Mar. 1, 2016) (Verizon March 1st Ex Parte).

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CONFIDENTIAL] of CenturyLink's operating revenues in 2015 were generated outside its ILEC footprint. CenturyLink uses its out-of-region operations primarily to serve national and regional customers—such as federal government agencies and multi-location businesses—that generate large volumes of traffic that can be carried over CenturyLink's national backbone. For each of those locations, CenturyLink must either build access facilities or lease access services. Like any other CLEC, CenturyLink evaluates each market and business opportunity to determine whether to build or purchase services from another provider. In 2015, CenturyLink purchased **[BEGIN HIGHLY CONFIDENTIAL]** **[REDACTED]** **[END HIGHLY CONFIDENTIAL]** in access services from a variety of vendors, including ILECs, traditional CLECs and cable operators.¹¹

CenturyLink has a stringent process for bringing in new access vendors. Before buying service from any Ethernet access provider, including a cable company, CenturyLink undertakes a rigorous technical review of the provider's access services and requires the provider to address any concerns identified in this review.¹² While it remains stringent, CenturyLink has streamlined the on-boarding process significantly by requiring Ethernet access vendors to furnish MEF 2.0 Certified or Compliant Ethernet service (or its equivalent),¹³ with identified Classes of Service (CoS) and associated SLAs guaranteeing performance characteristics, such as network availability, jitter, and latency. This approach limits or eliminates the need for extensive performance testing.¹⁴

As CenturyLink has discussed in earlier filings, the availability of cable-provided wholesale Ethernet access—and CenturyLink's purchase of such access—has increased significantly since 2013.¹⁵ While CenturyLink has purchased Ethernet access from cable operators, with SLAs, for more than six years, those purchases have accelerated over the past

¹¹ Letter from Melissa Newman, CenturyLink, to Marlene H. Dortch, FCC, WC Docket Nos. 15-247, 05-25, RM-10593 (Mar. 17, 2016) and attached "Growth of Non-ILEC Ethernet Access" at 7.

¹² See Declaration of Carla Stewart, at 2-3, attached as Exhibit 3 to Reply Comments of CenturyLink, WC Docket No. 05-25, RM-10593 (Feb. 19, 2016) (Stewart Reply Declaration).

¹³ See Metro Ethernet Forum, *Carrier Ethernet & CE 2.0*, available at: <https://www.mef.net/carrier-ethernet-services/carrier-ethernet-and-ce-2-0>.

¹⁴ Stewart Reply Declaration at 3.

¹⁵ See Declaration of Carla Stewart, at 1-2, attached as Exhibit 1 to Comments of CenturyLink, WC Docket No. 05-25, RM-10593 (Jan. 28, 2016) (Stewart Initial Declaration); CenturyLink Ex Parte on Growth of Non-ILEC Ethernet Access at 7.

two years, as cable operators have expanded the availability of their Ethernet offerings. [BEGIN
HIGHLY CONFIDENTIAL] [REDACTED]
[REDACTED] [END HIGHLY CONFIDENTIAL]

Recognizing the growing number of business customers transitioning to Ethernet services, CenturyLink launched an initiative in 2014 to expand the number of out-of-region buildings into which it can buy Ethernet access from non-ILEC vendors. In 2013, CenturyLink could purchase Ethernet access from non-ILEC providers in about [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] “high-value” commercial buildings outside CenturyLink’s ILEC footprint, with cable operators accounting for only about [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] of those buildings.¹⁶ By 2015, CenturyLink could purchase Ethernet access to more than [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] high-value commercial buildings, with cable operators serving [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] of those buildings.¹⁷ By the end of this year, CenturyLink projects that it will be able to obtain Ethernet access to about [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] high-value commercial buildings from non-ILEC vendors, as compared to approximately [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] such buildings from AT&T or Verizon. Of those [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] non-ILEC buildings, cable operators will serve about [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [REDACTED] [END HIGHLY CONFIDENTIAL] of them, without dependence on ILEC networks.¹⁸

This expanded availability of Ethernet access from non-ILEC providers predictably has resulted in more CenturyLink orders to these providers and fewer orders to AT&T and Verizon. In 2015, CenturyLink shifted more than [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] of CenturyLink’s orders for Ethernet access to non-ILEC

¹⁶ See Attachment 1 hereto (chart showing the growing availability of non-ILEC access to “high value” buildings). These “high-value” buildings are those identified as having significant demand for telecommunications services in Equifax’s Austin-Tetra marketing database. See Equifax website, *Marketing Data Services*, available at: http://learn.equifax.com/commercial/marketing_data_services/en_us.

¹⁷ See Attachment 1.

¹⁸ See *id.*

providers, and it expects this proportion to expand further in 2016.¹⁹ [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[END HIGHLY CONFIDENTIAL]

[BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

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¹⁹ CenturyLink Ex Parte on Growth of Non-ILEC Ethernet Access at 5. Given typical sales cycles, CenturyLink has found that it generally takes about three to four months for its sales professionals to begin ordering Ethernet access to buildings loaded in CenturyLink's sales tool. *Id.*

²⁰ See Stewart Initial Declaration at 3. The fact that construction is sometimes required for cable-provided Ethernet is irrelevant to the question whether cable is providing market discipline. All network providers must construct fiber facilities to serve locations currently not on their fiber network. Indeed, CenturyLink itself has to build facilities for approximately [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [BEGIN HIGHLY CONFIDENTIAL] percent of the fiber-based Ethernet circuits it provides.

²¹ See CenturyLink Ex Parte on Growth of Non-ILEC Ethernet Access at 8.

[REDACTED]

²³ [END HIGHLY CONFIDENTIAL]

While CenturyLink has not purchased wholesale Ethernet access from cable operators within its ILEC footprint, there is no reason to believe that cable's wholesale presence is any less pronounced in the CenturyLink service area. As noted, cable operators serve [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] of the retail Ethernet customers in that area, using facilities that can just as easily be used to provide wholesale services. And the franchise areas of the three largest cable operators include locations accounting for about two-thirds of the business telecom spend in CenturyLink's ILEC footprint.²⁴

2. Cable-provided Ethernet-over-fiber and Ethernet-over-HFC services are indistinguishable in quality from ILEC DSn and Ethernet services.

In some locations, the wholesale Ethernet that CenturyLink purchases from cable operators is provided over fiber, and other times over HFC, depending on the facilities available and the needs of the end-user customers. [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED] ²⁵ [END HIGHLY CONFIDENTIAL] HFC-based Ethernet currently provides symmetrical speeds up to 10 Mbps, and thus can be used to fulfill a significant

²² See CenturyLink Ex Parte on Growth of Non-ILEC Ethernet Access at 9.

²³ [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] See Stewart Initial Declaration at 3.

²⁴ See CenturyLink Ex Parte on Growth of Non-ILEC Ethernet Access at 6.

²⁵ CenturyLink Ex Parte on Growth of Non-ILEC Ethernet Access at 10.

percentage of CenturyLink's Ethernet access orders.²⁶ [BEGIN HIGHLY CONFIDENTIAL]

[REDACTED]²⁷ [END HIGHLY CONFIDENTIAL] Cable operators' Ethernet-over-fiber and Ethernet-over-HFC services also provide class of service and SLAs similar to those of ILEC Ethernet services.

Class of Service. Some Ethernet access providers allow customers to buy higher levels of Class of Service (CoS)²⁸—generally for a higher price—to enable the CoS designations on the customer's network to be recognized, on a packet-by-packet basis, when the customer's traffic is carried over the Ethernet provider's network. [BEGIN HIGHLY CONFIDENTIAL]

[REDACTED]²⁹ [END HIGHLY CONFIDENTIAL]

A lack of high or medium CoS does not have a significant impact on CenturyLink's decision whether to buy from a particular access vendor, because [BEGIN HIGHLY CONFIDENTIAL]

[REDACTED] [END HIGHLY CONFIDENTIAL] decline to buy higher levels of CoS, even when they are available. In 2015, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] of the total wholesale Ethernet circuits that CenturyLink purchased had low CoS, and only [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] had high.³⁰ On the retail side, only [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]

²⁶ *Id.*

²⁷ Stewart Reply Declaration at 3.

²⁸ CoS is a parameter used to differentiate Ethernet packets to give priority to certain types of traffic carried on a network, such as voice or video traffic. *See* Metro Ethernet Forum, Implementation Agreement; MEF 23.1; Carrier Ethernet Class of Service – Phase 2 (January 2012), available at: https://www.mef.net/Assets/Technical_Specifications/PDF/MEF_23.1.pdf.

²⁹ *See* Stewart Reply Declaration at 3.

³⁰ *See* Stewart Reply Declaration at 4; CenturyLink Ex Parte on Growth of Non-ILEC Ethernet Access at 11.

Service Level Agreements. The cable vendors' SLAs are also comparable to those of ILEC vendors, as reflected in the chart below.

AT&T	VERIZON	COMCAST	COX	TWC	CHARTER
[BEGIN HIGHLY CONFIDENTIAL]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[END HIGHLY CONFIDENTIAL]

For Ethernet services provided over fiber, cable vendors offer network availability SLAs of [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [REDACTED] [END HIGHLY CONFIDENTIAL] which is as good, or better, than ILEC

³¹ Declaration of Julie Brown and David Williams, at 8, attached as Exhibit 1 to Reply Comments of CenturyLink, WC Docket Nos. 05-25, RM-10593 (Feb. 19, 2016) (Brown-Williams Declaration).

vendors' SLAs. For example, [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] For latency, [BEGIN HIGHLY CONFIDENTIAL]
[END HIGHLY CONFIDENTIAL]

The cable vendors' SLAs for HFC-based Ethernet services also are comparable to those of ILEC access vendors. For network availability, for example, cable vendors have SLAs guaranteeing [BEGIN HIGHLY CONFIDENTIAL]
[END HIGHLY CONFIDENTIAL] For jitter, [BEGIN HIGHLY CONFIDENTIAL]
[END HIGHLY CONFIDENTIAL] Similarly, for latency, cable vendors offer SLAs for their HFC-based Ethernet services that are [BEGIN HIGHLY CONFIDENTIAL]
[END HIGHLY CONFIDENTIAL]

Cable operators have been offering some SLAs associated with their Ethernet services for several years. [BEGIN HIGHLY CONFIDENTIAL]
[END HIGHLY CONFIDENTIAL]

As with CoS, SLA levels are more important to some end-user customers than others. SLAs for jitter, for example, are immaterial to a customer unless it intends to use the service for a particularly jitter-intolerant application, which is not typically the case.³² Thus, for most of CenturyLink's end-user customers, cable-provided Ethernet-over-HFC services (as well as Ethernet-over-fiber services) are indistinguishable in performance from the wholesale Ethernet services CenturyLink purchases from ILECs and CLECs, which is why CenturyLink now buys them so frequently. CenturyLink uses these cable-provided services to provide various types of enterprise services to its end-user customers, including multiprotocol label switching (MPLS) services. CenturyLink has also used cable-provided Ethernet services for federal government and other customers with demanding specifications.³³

³² Stewart Reply Declaration at 5.

³³ *See id.*

3. Cable broadband Internet access services also are an attractive and viable alternative to ILEC business data services for many business customers.

In addition to the migration to cable Ethernet discussed above, CenturyLink and other ILECs have seen an exodus of DSn customers to cable broadband Internet access services.³⁴ Business customers seeking higher bandwidth than a DS1 at a lower price point find these services attractive, even if they lack SLAs or symmetrical speeds.³⁵ Indeed, Windstream markets fiber-based broadband Internet access services to small and medium businesses “that can’t afford dedicated large Ethernet circuits but have outgrown DSL and T-1.”³⁶

All customers want reliable services, but many are not willing to pay a premium for service guarantees or traffic prioritization they don’t need.³⁷ Some of CenturyLink’s most strategic wholesale customers now routinely purchase cable operators’ broadband Internet access services, rather than CenturyLink’s Ethernet services. As one of these wholesale customers recently told CenturyLink: “We are seeing cases where [one of our end-user] customer[s] wants a 10MB or 20MB service (both directions) which usually pushes us to an Ethernet solution with

³⁴ As Verizon has noted, however, cable broadband Internet access services are not properly characterized as “best-efforts” services, as cable operators tailor these services to business customers and negotiate SLAs guaranteeing specified repair intervals and availability. Verizon March 1st Ex Parte at 3. See Cox Business Service Data Sheet at 1, available at: <http://www.coxbusiness.com/meet/oc/sheila/pdfs/CBI%20Data%20Sheet.pdf> (“You’re assured of consistent, reliable data service when you need it because we own and maintain our own nationwide IP network and monitor it 24/7”).

³⁵ At least some cable operators are negotiating SLAs when they provide broadband Internet access services to business customers. See Verizon March 1st Ex Parte at 3.

³⁶ See Fierce Telecom, Sean Buckley, *Windstream Brings 1 Gbps to 35,000 residential, business customers in four markets*, available at: http://www.fiercetelecom.com/story/windstream-brings-1-gbps-35000-residential-business-customers-four-markets/2016-04-05?utm_medium=nl&utm_source=internal&mkt_tok=3RkMMJWWfF9wsRokv6jKdu%252FhmjTEU5z17egvX663lMI%252F0ER3fOvrPUfGjI4GRMJkMq%252BTFAwTG5toziV8R7LMKM1ty9MQWxTk (Apr. 5, 2016) (quoting Sarah Day, president of consumer and small business for Windstream) (“Small businesses have demand for an Internet product that is superior to some of the entry speeds we traditionally offered, but are not in a position to buy dedicated circuits that are traditionally offered in the business space.”)

³⁷ Brown-Williams Declaration at 2-3.

you [but] a 50/10 or 50/25 cable [broadband Internet access] solution will give them the needed speed. It is not really a completely symmetrical solution but they end up with 10/10 or 20/20 at a much lower cost point than Ethernet so they go with that solution.”³⁸ As noted by AT&T, “[t]he CLECs’ dismissal of cable’s broadband Internet product as a viable competitor to special access requires one to believe that the cable companies’ 100 Mbps service may sometimes offer speeds that fall below the 1.5 Mbps service, or that such services would be subject to frequent and sustained outages[,]” which is “absurd[.]”³⁹ For all these reasons, CenturyLink views cable operators to be their primary competitors in the business data marketplace.⁴⁰

As an out-of-region CLEC, CenturyLink has also [BEGIN HIGHLY
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CONFIDENTIAL] These services can also be used for private networking.⁴¹ Thus, cable broadband Internet access services increasingly are being used as cheaper substitutes for ILEC DS1 services, to serve multi-location customers with many small locations, thus filling the niche on which Windstream bases its demands for additional regulation of ILEC Ethernet services, as well as additional DS1/DS3 unbundling.⁴²

³⁸ Brown-Williams Declaration at 3-4 (emphasis in original). Similarly, one of Verizon’s major wholesale customers told Verizon that cable broadband Internet access service has become an “MPLS killer” because it can run its MPLS network over the cable service, rather than ILEC DSn or Ethernet services. Verizon March 1st Ex Parte at 3.

³⁹ AT&T March 21st Ex Parte at 9.

⁴⁰ Brown-Williams Declaration at 3. See also Verizon March 1st Ex Parte at 4-5 (discussing competitive losses to cable operators’ broadband Internet access services and resulting declines in Verizon’s Ethernet sales).

⁴¹ See Verizon March 1st Ex Parte at 3 (noting the use of cable broadband services for virtual private networks (VPNs) and Multi-Protocol Label Switching (MPLS) services).

⁴² See Letter from John T. Nakahata, counsel to Windstream, to Marlene H. Dortch, FCC, GN Docket No. 13-5, WC Docket Nos. 15-1, 05-25, 15-247, RM-10593, at 1-16 and Attachment 1 (Mar. 14, 2016) (Windstream March 14th Ex Parte).

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based wireless backhaul services, cable operators are devoting their considerable resources to business customers of all sizes.⁴⁸ Such sunk investments are also irreversible.

Given cable operators' rapid expansion and expected further growth in the business data marketplace, and the relative ease of upgrading DOCSIS 3.0 systems to provide Ethernet-over-HFC services if they do not already provide them,⁴⁹ the only reasonable approach in the above-referenced proceedings is for the Commission to consider *all* areas served by DOCSIS 3.0 systems, according to the National Broadband Map, to be subject to competition from cable operators. Nearly all of this competition is occurring in areas served by ILECs, given the substantial overlap between cable and ILEC footprints.⁵⁰

<https://www.sn1.com/InteractiveX/ArticleAbstract.aspx?id=34738859> (Dec. 9, 2015) (noting that "[c]able's commercial segment logged another quarter of double-digit year-over-year growth, propelled by small and midsize businesses," while "top operators are increasingly looking to diversify growth by tapping large, multi-office enterprises across their footprints."); Cindy Whelan, Current Analysis, *Comcast Business – Business Services US* (Nov. 13, 2015) ("While SMBs continue to represent the majority of Comcast Business revenue, enterprise (including mid-market) represented 20% of Comcast Business revenue as of Q2 2015, and is growing more than 30% annually.")

⁴⁸ See Verizon March 1st Ex Parte at 2.

⁴⁹ Declaration of Michael Bugenhagen, attached as Exhibit 2 to Reply Comments of CenturyLink, WC Docket No. 05-25, RM-10593 (Feb. 19, 2016). According to Mr. Bugenhagen, "a cable operator typically does not need to replace or upgrade its existing DOCSIS 3.0 HFC plant to provide Ethernet services." *Id.* ¶ 7.

⁵⁰ See CenturyLink Ex Parte on Growth of Non-ILEC Ethernet Access at 6 (showing overlap, in terms of business telecom spend, between ILEC and cable footprints). The fact that a cable operator's network does not fully overlap with a competing ILEC's network is no reason to discount competition from cable operators, as Sprint suggests. See Sprint Reply Comments at 55-56. All providers—non-ILEC and ILEC alike—have networks that are concentrated in certain regional areas, often requiring them to rely on other providers to serve customers outside of those areas. See Stewart Initial Declaration at 3-4. No one can credibly claim that cable operators such as Comcast, Charter, and Cox lack sufficient scale to compete effectively in the business data marketplace.

5. ILECs are responding to cable competition with lower prices and customer-friendly terms and conditions for their business data services.

These widespread and growing competitive incursions by cable operators have not gone unnoticed by ILECs. Verizon has explained the substantial impacts of cable on its wholesale business data services and how it is reacting in the marketplace.⁵¹ In particular, Verizon has rolled out “aggressively reduced pricing for Ethernet” service, through its Titan program.⁵² AT&T is similarly responding to competitive pressure from cable operators with promotional pricing for its Ethernet services at some locations where it has installed fiber facilities.⁵³

[BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] Windstream is also adjusting its offerings to compete with cable operators.⁵⁴

In its role as a business data service provider, CenturyLink has offered increasing discounts on its DSn and Ethernet services, due, in part, to competition from cable operators. In 2012, CenturyLink introduced a Revenue Discount Simplification Plan (RDSP), which provides special access customers additional discounts on DSn services, based on their purchase of CenturyLink business data services including DSn, Ethernet, Wavelength, and MPLS. Some RDSP customers have grown their monthly credits by 80 percent from the start of their RDSP

⁵¹ See Verizon March 1st Ex Parte at 2-6.

⁵² *Verizon to challenge cable operators with ‘Titan’ business Ethernet program*, Fierce Telecom, available at: <http://www.fiercetelecom.com/story/verizon-challenge-cable-operators-titan-business-ethernet-program/2016-03-21>, at 1; Verizon March 1st Ex Parte at 5.

⁵³ See CenturyLink Ex Parte on Growth of Non-ILEC Ethernet Access at 14.

⁵⁴ See Sean Buckley, Fierce Telecom, *Windstream Enhances Ethernet Position By Expanding On-Net Fiber, Network Partnerships*, available at: <http://www.fiercetelecom.com/story/windstream-enhances-ethernet-position-expanding-net-fiber-network-partnersh/2016-03-01> (Mar. 1, 2016) (“[W]hen you look at the pricing [of Windstream’s Ethernet,] they are priced to compete with the MSOs in the territories, particularly Time Warner Cable and Comcast.”) (quoting Rick Malone, Principal of Vertical Systems Group).

while their revenue only grew 45 percent in that same time period.⁵⁵ Wholesale customers in the RDSP currently include [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]

Aside from discounted pricing, the RDSP also eases customers' migration from DSn to Ethernet services. As XO has noted, "in calculating the discount based on the amount purchased, CenturyLink will include purchases for both DSn and Ethernet services, an approach that reflects the technology transition to fiber-based IP services[.]"⁵⁶ This and other aspects of the RDSP led XO to characterize the RDSP as a model of "commercial fairness and reasonable dealing[.]"⁵⁷

Competition from cable operators and other providers has also prompted CenturyLink to offer increasing discounts on its Ethernet services, particularly for *wholesale* Ethernet services. In 2013, CenturyLink's average revenue per unit (ARPU) for its five largest carrier customers for a 10 Mbps Metro Ethernet service was [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] per month. Two years later, that figure had fallen to [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL], a decline of [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] percent.⁵⁸ These rates primarily reflect those paid by wholesale customers, which account for approximately [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] of the revenues for CenturyLink's Metro Ethernet service.⁵⁹

The "rack rate" for a month-to-month 10 Mbps Metro Ethernet circuit in CenturyLink's Rates and Service Schedule (RSS) is \$757, but customers that commit to a longer term—typically of one to three years—receive substantial discounts. For example, the same circuit for a three-year term in the RSS is priced at \$621 per month.⁶⁰ Wholesale customers often negotiate even larger discounts.

⁵⁵ See Brown-Williams Declaration at 4. These additional credits are an enhancement to any other tariff plan discounts applicable to the customer's DSn circuits from the standpoint that all data services across all CenturyLink ILEC affiliates are counted to derive the credit. *Id.*

⁵⁶ Comments of XO Communications, LLC on ILECs' Direct Cases, WC Docket No. 15-247, at 49-50 (Feb. 5, 2016).

⁵⁷ See *id.* at 52.

⁵⁸ Brown-Williams Declaration at 4-5.

⁵⁹ *Id.* at 5.

⁶⁰ *Id.*

6. Detailed information on current and potential competition from cable operators was not captured in the 2013 data collection.

Unfortunately, this highly probative information regarding actual and potential competition from cable operators in the business data marketplace is almost completely absent from the 2013 data collected in the *Business Data Services* proceeding. To some extent, that omission was unavoidable, given the dramatic growth in cable-provided business data services that occurred *after* 2013. Nevertheless, the Commission and Wireline Competition Bureau also bear partial responsibility for this omission, given the series of decisions excluding from the data collection granular information on cable facilities capable of providing business data services.

A brief review of that history, *as well as its consequences*:

- *2012 Data Collection Order*. In the original version of its data request, the Commission would have required all competitive providers of special access services to submit detailed and granular information, including data on their facilities, quantities sold, prices charged, and revenues earned for those services—with one exception for so-called “Best Efforts Business Broadband Internet Access Services.”⁶¹ The Commission found that providers of those “best efforts” services generally deliver them “throughout their footprint over the same network facilities they use to deliver mass market broadband Internet access[.]”⁶² The Commission therefore concluded that it “need not collect this data at the same level of granularity as location and facilities data for special access[.]” and instead required providers of these “best-efforts” services to report the census blocks in which they provided these services or certify that the data they submitted in connection with the State Broadband Initiative Grant Program accurately identified the areas in which they provided those services.⁶³ *Thus, the Commission chose not to collect building-by-building data on cable operators’ last-mile facilities used to provide broadband Internet access services in competition with ILEC DSn and Ethernet services—based primarily on a finding that such facilities were ubiquitous in cable footprints.*

⁶¹ See *Special Access For Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318, 16331-35 ¶¶ 30-43 (rel. Dec. 18, 2012) (*2012 Data Collection Order*).

⁶² *Id.* at 16335-36 ¶ 44.

⁶³ *Id.* The Commission also noted that it already had information on enterprise subscriptions to broadband Internet access services through its Form 477 collection, which includes connections information “by census tract (areas roughly the size of zip codes)[.]” See *id.*

- *2013 Bureau Order.* In September 2013, the Wireline Competition Bureau made a number of “clarifications” to the scope of the data request, pursuant to its delegated authority.⁶⁴ For non-cable competitive providers, the Bureau expanded the data collection to include not only facilities currently used to provide business data services, but also those capable of providing such services.⁶⁵ But, for cable operators, the Bureau adopted a much narrower reporting requirement. Specifically, within their franchise areas, cable operators were required to report only those last-mile facilities “that are connected to a *Node* (*i.e.*, headend) that has been upgraded or was built to provide Metro Ethernet (or its equivalent) service.”⁶⁶ For last-mile facilities not connected to such a node, cable operators were required to report only those facilities used during the reporting period to provide a Dedicated Service or a service that incorporates a Dedicated Service.⁶⁷ The Bureau claimed that it could still account for potential competition from these facilities through other data in the collection, including “fiber maps filed by cable system operators.”⁶⁸ *Thus, the Bureau required cable operators to report only those last-mile facilities actually being used to provide special access services, while requiring non-cable CLECs to report both in-service and idle last-mile facilities capable of providing those services.*
- *CenturyLink Application for Review.* In October 2013, CenturyLink filed an application for review of the *2013 Bureau Order*’s limitations on the reporting requirements for cable operators, fearing that the decision “w[ould] result in a failure to account fully for robust and growing cable-based competition, producing ‘an incomplete picture of competition in this market . . . [that is] likely to lead to

⁶⁴ See *Special Access For Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order, 28 FCC Rcd 13189 (Wireline Comp. Bur. Sept. 18, 2013) (*2013 Bureau Order*).

⁶⁵ *Id.* at 13211-12 ¶ 53.

⁶⁶ *Id.* at 13200 ¶ 26.

⁶⁷ *Id.* at 13201 ¶ 27.

⁶⁸ See *id.* Other information the Bureau found relevant to potential competition included “the location of [cable operators’] *Nodes* upgraded to provide Metro Ethernet (or its equivalent), and the information provided showing those census blocks within the [franchise areas] where the cable system operator reports making broadband service available with a bandwidth rate of at least 1.5 Mbps in both directions upstream/downstream).” *Id.*

inappropriate regulatory intervention.”⁶⁹ The Commission never ruled on CenturyLink’s application. *Thus, the Commission let stand the Bureau’s decision not to collect granular information on cable operator’s “idle” last-mile facilities capable of providing business data services.*

- *2014 Bureau Order on Reconsideration.* In September 2014, the Bureau further narrowed the special access data collection, following consultations with the Office of Management and Budget. Of most relevance here, the Bureau significantly reduced the information cable operators were required to report on their fiber networks. Specifically, the Bureau eliminated the obligation for cable operators to include feeder links to end-user locations in the fiber maps submitted in the data collection and narrowed cable operators’ reporting requirements for nodes used to interconnect with third party networks.⁷⁰ *Thus, the Bureau eliminated the reporting requirement for cable last-mile fiber facilities that it had earlier found important in accounting for potential competition from cable providers.*⁷¹

This series of decisions by the Commission and Bureau substantially undermined the Commission’s ability to analyze the capability of cable facilities on a geographically granular basis. Because the Commission did not collect it, the building-by-building facilities data in the data collection does not include cable facilities that were idle, but capable of providing business data services, in 2013. As a result, the Commission must rely principally on the information submitted by cable operators in the Form 477 collection process, as it anticipated in the 2012

⁶⁹ Application for Review of CenturyLink, WC Docket No. 05-25, RM-10593, at 1 (Oct. 22, 2013) (quoting Statement of Commissioner Ajit Pai on Bureau Adoption of Special Access Data Collection at 2 (Sept. 18, 2013)). CenturyLink noted that the Bureau’s decision omitted from the data collection a subset of the locations “to which a cable operator’s plant is already connected, presumably via a hybrid fiber coaxial (HFC) facilities”—which, in CenturyLink’s view, exceeded the Bureau’s delegated authority and contravened “the Commission’s directive to collect comprehensive data on all *Connections* ‘capable of’ providing *Dedicated Services*.” *Id.* at 3-4.

⁷⁰ *See Special Access For Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Order on Reconsideration, 29 FCC Rcd 10899 (Wireline Comp. Bur. Nov. 26, 2014). With these changes, cable operators were required to show only their interoffice fiber networks in the submitted fiber maps and to report only those “headends (i.e., *Nodes*) that they have upgraded to provide metro Ethernet service, or its functional equivalent.” *Id.*

⁷¹ 2013 Bureau Order, 28 FCC Rcd at 13201 ¶ 27.

Data Collection Order,⁷² coupled with information on subsequent marketplace developments of the type CenturyLink discussed above.

7. The Commission cannot reasonably or lawfully ignore these critical market facts, simply because they are recent and may not be reflected in the 2013 data collection.

It goes without saying that the Commission cannot “blind itself” to competition over cable networks just because that competition isn’t fully reflected in the 2013 data collection.⁷³ That is particularly the case given the Commission’s and Bureau’s decisions just noted, limiting the data reported by cable operators on actual and potential competition—which now appears to be the most important data that the Commission could have gathered. As discussed in detail above, the growth in cable-provided business data services has transformed the retail and wholesale marketplace for these services and prompted ILECs to reduce their prices and introduce other customer-friendly terms and conditions for the services that are the subject of the instant proceedings.

Given the glaring omission of most cable facilities information in the data collection, the Commission must give adequate weight to information on cable operators’ activities submitted by CenturyLink and other parties. As summarized by NCTA, “while the 2013 data collected by the Commission may provide a snapshot of the marketplace at that time, it does not reflect the marketplace as it exists today, or how it may look in the future, and any competitive analysis that relies primarily on data from 2013 in determining the state of the marketplace would understate the level of competition.”⁷⁴

The Commission also may not ignore evidence of facilities-based competition from cable providers on the basis that such competition has accelerated relatively recently. Courts have repeatedly held agency refusals to consider recent or new evidence arbitrary and capricious. For example, in *American Radio Relay League, Inc. v. FCC*, the D.C. Circuit reversed the Commission’s decision to retain an interference-related extrapolation factor for amateur radio operators, known as Access Broadband over Power Line operators, finding that the Commission should have provided a better explanation of its dismissal of relevant “new information,” beyond its conclusory statement that such data did not provide “a convincing argument for modifying”

⁷² See *2012 Data Collection Order*, 27 FCC Rcd at 16335-36 ¶ 44.

⁷³ See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999) (“The FCC cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent’s network.”).

⁷⁴ NCTA March 22nd Ex Parte at 1.

the extrapolation factor.⁷⁵ Courts have similarly remanded other federal agency decisions for failing to give adequate consideration to new evidence submitted to the agency prior to its decision.⁷⁵

More generally, of course, courts have uniformly reversed agency failures to consider significant evidence or arguments, either where such failures were entirely unexplained or where agencies failed to respond to the evidence or arguments in a meaningful way.⁷⁷

The Commission also could not dismiss the facilities-based cable competition discussed above on grounds that it is too nascent and/or potentially ephemeral to form the basis for a finding that the marketplace is competitive or to even include in the Commission's analysis. Clearly, an agency cannot respond to conflicting evidence in a manner that is irrational or contrary to its established regulatory approach.⁷⁸ Here, a refusal to consider deployed facilities capable of providing business data services would run counter to the agency's long-standing analytical framework, which considers sunk investment to be a reliable indicator of durable

⁷⁵ 524 F.3d 227, 241 (D.C. Cir. 2008).

⁷⁶ See, e.g., *Port of Seattle, Washington v. FERC*, 499 F.3d 1016, 1034-35 (9th Cir. 2007), *cert. denied sub nom. Puget Sound Energy, Inc. v. California*, 558 U.S. 1136 (2010) (FERC's failure to consider or examine "new evidence" of market manipulation was arbitrary and capricious); *PUC of the State of California v. FERC*, 462 F.3d 1027, 1058 (9th Cir. 2006) (same); *American Tunaboat Ass'n v. Baldrige*, 738 F.2d 1013, 1016-17 (9th Cir. 1984) (NOAA's unexplained refusal to consider post-1977 data regarding porpoise populations was arbitrary and capricious).

⁷⁷ See, e.g., *Ass'n of Private Sector Colleges and Universities v. Duncan*, 681 F.3d 427, 449 (D.C. Cir. 2012) (failure to address commenters' concerns requires remand); *International Union, United Mine Workers of America v. Mine Safety and Health Administration*, 626 F.3d 84, 94 (D.C. Cir. 2010) (agency's "failure to address . . . comments, or at best its attempt to address them in a conclusory manner, is fatal to its defense of the [challenged] provision"); *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1200 (D.C. Cir. 2005) (FERC's failure to respond to objections was arbitrary and capricious); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1050-51 (D.C. Cir. 2002) (failure to address issues raised by party is arbitrary and capricious), *mod. on other grounds*, 293 F.3d 537 (D.C. Cir. 2002); *AT&T Wireless Servs. v. FCC*, 270 F.3d 959, 968 (D.C. Cir. 2001) (FCC's conclusory rejection of party's report required reversal; "[c]onclusory explanations for matters involving a central factual dispute where there is considerable evidence in conflict do not suffice to meet the deferential standards of our review").

⁷⁸ See *City of Vernon, California v. FERC*, 845 F.2d 1042, 1048 (D.C. Cir. 1988); *Office of Communication of United Church of Christ v. FCC*, 779 F.2d 702, 714 (D.C. Cir. 1985).

competition.⁷⁹ Even the Commission's 2012 *Suspension Order* did not question this principle.⁸⁰ Rather, the Commission initiated further inquiry on whether competitive conditions varied too significantly across MSAs to continue permitting pricing flexibility on an MSA-wide basis and whether collocation necessarily demonstrates the existence of competition for channel terminations.⁸¹

In light of these decisions, the Commission's rejection of evidence proving sunk cable investment, based on a finding that such competition is not well established, would constitute an unlawful "non-sequitur,"⁸² and would reject an approach that, based on past practice, "appears to serve precisely the agency's purported goals" in facilitating competition.⁸³ In this "continuing examination of . . . market forces[.]" in which the Commission is attempting to update the record on special access competition, it would be arbitrary to "act[] differently" by rejecting "new evidence" of the kind that it has relied upon previously as demonstrating competition.⁸⁴ This is especially true here, where the Bureau has specifically invited and deemed "appropriate" the "addition of new information."⁸⁵

⁷⁹ See, e.g., *Unbundled Access to Network Elements*, Order on Remand, 20 FCC Rcd 2533, 2591 ¶ 98 n. 279 (2004) (where competitive carrier has borne the "high fixed and sunk costs of deploying fiber" transport, competition is not impaired by lack of access to ILEC unbundled transport), *aff'd sub nom. Covad Communs. Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006); *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14261-64 ¶¶ 77, 79-80 (1999) ("*Pricing Flexibility Order*") ("irreversible, or 'sunk' investment in facilities" by competitors shows that special access competition is sufficiently well established that ILEC exclusionary conduct is unlikely), *aff'd sub nom. WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

⁸⁰ See *Special Access for Price Cap Local Exchange Carriers*, Report and Order, 27 FCC Rcd 10557 (rel. Aug. 22, 2012).

⁸¹ See *id.* at 10574-98 ¶¶ 35-71.

⁸² *City of Vernon*, 845 F.2d at 1048.

⁸³ *Office of Communication*, 779 F.2d at 714.

⁸⁴ *PUC of the State of California v. FERC*, 462 F.3d at 1058.

⁸⁵ *Special Access for Price Cap Local Exchange Carriers*, Order, 30 FCC Rcd 14467, 14471 ¶ 15 (Wireline Comp. Bur. Dec. 21, 2015).

8. Given this evidence of robust competition, as well as that reflected in the data collection, the Commission could not reasonably impose additional regulations on ILEC enterprise broadband services.

Certain parties have used the Commission's inquiry into ILEC DSn services to seek additional regulation of Ethernet and other enterprise broadband services provided by ILECs. Some CLECs urge the Commission to re-impose dominant carrier regulation of ILEC enterprise broadband services, after a decade of price reductions and customized offerings, enabled by enterprise forbearance, to the benefit of retail and wholesale customers.⁸⁶ Windstream further seeks to upend 20 years of local competition policy by imposing one-sided resale obligations and other pricing restriction on ILEC Ethernet services.⁸⁷ As CenturyLink has explained, these proposals are procedurally flawed, flagrantly inconsistent with applicable precedent, and contrary to the record compiled in the *Business Data Services* proceeding.⁸⁸

Such proposals to pile asymmetric regulation on ILEC Ethernet services are especially untenable given the competition from cable operators, as well as other competitive providers. It is simply inconceivable that CenturyLink could be classified as a "dominant" provider of retail Ethernet services in its ILEC footprint, for example, when [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] of the customers for those services in that area are served by cable operators and another [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] are served by CLECs.⁸⁹ Similarly, given that [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] it is difficult to understand how the ILECs in those areas could be considered "dominant" providers of Ethernet services.⁹⁰

⁸⁶ See, e.g., Comments of Birch *et al.*, WC Docket No. 05-25, RM-10593, at 65-66 (Jan. 22, 2016) (Comments of Birch *et al.*); Comments of Sprint Corporation, WC Docket No. 05-25, RM-10593, at 86 (Jan. 27, 2016) (Sprint Comments).

⁸⁷ See Comments of Windstream Services, LLC, WC Docket No. 05-25, RM-10593 at 60-68, (Jan. 27, 2016); Windstream March 14th Ex Parte at 5-8.

⁸⁸ See CenturyLink Reply Comments at 69-76.

⁸⁹ See TNS Business Wave Survey.

⁹⁰ As noted, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] See CenturyLink Ex Parte on Growth of Non-ILEC Ethernet Access at 5.

These market developments also eliminate any justification for Windstream's misguided efforts to impose new resale and pricing regulation on ILECs alone. CenturyLink has documented the widespread availability of wholesale Ethernet offerings provided over cable networks, which are completely independent of ILEC networks and services. The availability of these wholesale offerings is particularly noteworthy, because they enable multiple competitive alternatives at each location to which they are available.⁹¹ Given these competitive alternatives, CenturyLink and other ILECs lack market power that would justify the draconian and asymmetric regulations sought by Windstream.

Some CLECs have suggested that, even if the Commission were to give full weight to competition from cable providers, the business data marketplace would at best be a duopoly.⁹² This is incorrect. Such arguments ignore competition from the second-largest Ethernet provider (Level 3), as well as other CLECs. And, as CenturyLink has noted, it expects to be able to obtain Ethernet access from non-cable CLECs to over [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] buildings by the end of this year.⁹³ Nevertheless, even if the Commission wrongly characterized the marketplace as a duopoly, there would be no justification for regulating ILECs alone as dominant providers, when they face facilities-based competition from cable operators in most areas. As explained by AT&T, the Commission, Department of Justice, and federal courts have recognized that sunk investment by one competitor is sufficient to ensure competitive outcomes.⁹⁴

In this regard, the CLECs' reliance on holdings in the *Qwest Phoenix Forbearance Order* is misplaced.⁹⁵ Under the Commission's rules, parties seeking forbearance are required to prove

⁹¹ CenturyLink has no way of knowing the extent to which Windstream and other CLECs purchase wholesale business data services from cable operators, but these carriers are equally capable to CenturyLink of negotiating such purchase arrangements, and cable operators have every incentive to maximize their wholesale sales.

⁹² See, e.g., Sprint Reply Comments at 55-56.

⁹³ See CenturyLink Ex Parte on Growth of Non-ILEC Ethernet Access at 7.

⁹⁴ See AT&T March 21st Ex Parte at 3-6. See also Declaration of Mark Israel, Daniel Rubinfeld, and Glenn Woroch at 13-14, attached to Reply Comments of AT&T Inc., WC Docket No. 05-25, RM-10593 (Feb. 19, 2016).

⁹⁵ See Birch *et al.* Comments at 11-12; Sprint Comments at 5-9.

that each of the statutory criteria is satisfied.⁹⁶ In contrast, those seeking dominant carrier regulation would need to show that this regulation is necessary and in the public interest, even if they could overcome the procedural hurdles necessary to undo forbearance.⁹⁷ That the CLECs have not done.

9. The FCC also must consider the impact of cable-provided business data services in its regulation of ILEC DS1 and DS3 services.

The widespread availability of cable Ethernet services also should strongly influence the Commission's consideration of appropriate regulation of ILEC DSn services. As Sprint notes, "a dedicated Ethernet link is the last-mile connection to a customer premise and therefore is part of the same relevant product market as a TDM-based channel termination for purposes of assessing competitive conditions."⁹⁸ Business customers of all sizes are migrating from ILEC DS1 and DS3 services to Ethernet services—the most compelling evidence available that customers view these services to be reasonably comparable substitutes.

Clearly, the general availability of non-ILEC Ethernet services imposes a constraining effect on ILECs' pricing of DS1 and DS3 services, particularly as Ethernet prices continue to fall. **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL] Such pricing pressures will only expedite the migration of DS1 customers to Ethernet.

Given these competitive dynamics, there is no need for the Commission to impose further regulation on ILEC DSn services, which will serve only to delay the natural migration to Ethernet and other IP-based services. Instead, the Commission should retain Phase II relief in all MSAs that currently have that relief; extend Phase II relief to MSAs that currently have Phase I relief or no relief, where the data show a presence of substantial competitive facilities; revise the triggers to better reflect the presence of competition; and make reciprocal any revision of the

⁹⁶ See 47 C.F.R. § 1.54(b)(1); *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Report and Order, 24 FCC Red 9543, 9555 ¶ 20 (2009) ("We now state explicitly that the burden of proof is on forbearance petitioners at the outset and throughout the proceeding.").

⁹⁷ CenturyLink Reply Comments at 52.

⁹⁸ Sprint Comments at 11-12 ("The fact that Ethernet connections use a different protocol to transmit the same voice and data traffic carried over legacy facilities is irrelevant to the proper product market classification of Ethernet.").

current regime based on more granular geographic areas, so that ILECs can obtain relief in such areas where competition is present.⁹⁹

Conclusion

While the 2013 data collection demonstrates the existence of competitive alternatives to ILEC DSN and Ethernet services in nearly all census blocks, it also understates the extent of that competition. That is the case for two reasons. First, cable operators generally were exempted from the obligation to report facilities capable of providing business data services, in contrast to the granular reporting obligations applicable to ILECs and non-cable CLECs. Second, the past two years has witnessed an explosion of cable retail and wholesale Ethernet services, as evidenced by CenturyLink's experience—detailed herein—as both an in-region retail competitor to cable Ethernet services and an out-of-region purchaser of wholesale Ethernet services from cable operators. This competition from cable operators is not prospective or speculative in any way. It is happening now. Yet there also is every indication that it will continue to grow. Thus, the Commission's analysis here must give full weight to the evidence submitted by CenturyLink and other parties regarding the widespread availability of cable Ethernet services as alternatives to ILEC DSN and Ethernet services.

Pursuant to Section 1.1206(b) of the Commission's rules, a copy of this ex parte presentation is being filed in the appropriate dockets.

Sincerely,

/s/ Melissa E. Newman

⁹⁹ AT&T March 21st Ex Parte, Attachment A, at 4.

ATTACHMENT 1

(REDACTED – FOR PUBLIC INSPECTION)

High-Value Building Trend

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